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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 333

MARILYN B. HASKELL, an infant by CELIA ALBERTS, her guardian ad litem,

Respondent,

against

JEROME J. HASKELL,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

I. STANLEY SEIN,
Counsel for Petitioner,
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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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No: .....

MARILYN B. HASKELL, an infant by CELIA ALBERTS, her guardian ad litem,

Respondent,

against

JEROME J. HASKELL,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of the State of New York in the above entitled case.

Opinions Below

The memorandum decisions of the Honorable Justice Louis J. Capozzoli, Special Term, New York Supreme Court, New York County, are unreported. Memorandum opinion of the Appellate Division of the Supreme Court, First Department is reported in 6 App. Div. (2) 788. The opinion of the Court of Appeals is reported in 6 N. Y. (2d) 79. Each of the aforementioned is printed as an appendix to this petition.

Jurisdiction

The judgment sought to be reviewed was entered on June 16, 1959 in the office of the County Clerk of the County of New York, by the Supreme Court of the State of New York, County of New York, on an order of the Court of Appeals, dated May 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

The state statute involved is the New York Civil Practice Act, Sec. 1171 B. This is set out verbatim in Appendix A.

Questions Presented

1. Under all the facts and circumstances of this case, was there a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of the judgment *in personam* entered against him, by reason of the failure of the respondent to serve upon the petitioner the notice required by Section 1171-B, Civil Practice Act, State of New York, and the Fourteenth Amendment to the United States Constitution?

2. Did the opinion of the Court of Appeals of the State of New York in this case, conflict with the principles of law, set forth in the opinion of the Supreme Court of the United States in *Griffin* v. *Griffin*, 327 U. S. 220, with respect to the underlying question present in both of said cases, relating to the preliminary notice which is required to be served upon a husband prior to the entry of a judgment for arrearages in a matrimonial action?

Statement of the Case

On May 23, 1950, the Supreme Court of the State of New York entered a judgment in respondent's favor in an annulment action awarding the sum of $30.00 per week for the

support of the son of the parties. Seven years after the entry of said judgment, respondent procured an order requesting the entry of a judgment for arrearages in the amount of $10,320. The order to show cause on the application for such latter judgment provided for service upon the petitioner, a resident of Connecticut, or his attorney (R. 9, 10, 12).

As the record is unveiled it appears uncontradicted therein that the respondent neither served the petitioner nor his attorney (R. 19-20). Service of the aforementioned show cause order was made upon an attorney, Frederick E. M. Ballon, whom, the respondent knew at the time of service upon the former, was not "his (petitioner's) attorney". Respondent had affirmative knowledge that another attorney had represented petitioner just a few months prior to the application for arrearages in another matter, relating to the custody of the child of the parties and this other attorney also represented petitioner in the change of name of the child, without petitioner's consent (Opinion, Appendix E, R. 38-39).

The record further shows that Frederick E. M. Ballon in response to the notice served upon him submitted an affidavit to Special Term, Supreme Court, New York County, that he was neither authorized to appear for petitioner, nor was he petitioner's attorney. The affidavit in full reads as follows:

> "ARTHUR M. STOLL, being duly sworn, deposes and says that he is associated in practice with Frederick E. M. Ballon, an attorney maintaining offices at 1450 Broadway, New York, is fully familiar with the clientele of the office, having joined the firm in late 1938, and submits this affidavit in partial opposition to the instant application.
>
> The moving papers, required to be served upon the defendant or his counsel, were served upon Frederick E. M. Ballon, as attorney for the defendant. Deponent

is constrained to inform the Court that Frederick E. M. Ballon is not the attorney for the defendant, neither in the instant or any other matter.

Frederick E. M. Ballon's representation of the defendant in the instant matter, terminated some seven years ago, ceased upon issuance of a final order. A search of office records indicates our general representation to have ceased at about the same time.

Deponent respectfully submits that the attorney upon which the moving papers have been served is not the attorney for the defendant, has not the authority to appear on his behalf, and cannot concede jurisdiction.

Deponent endeavored to locate the defendant, to apprise him of the situation, but has been unsuccessful; this office has no indicia of his present whereabouts other than as set forth in the moving papers which confirm his residence without the state.

WHEREFORE, deponent respectfully prays that the office of Frederick E. M. Ballon be permitted to return the aforesaid moving papers and be relieved of all further responsibility in connection therewith.

ARTHUR L. STOLL."

(R. 19)

The respondent's attorneys upon receipt of this affidavit which confirmed the termination of the attorney-client relationship between Mr. Ballon and the petitioner requested Mr. Ballon to "dispatch a letter to the defendant at his residence, as well as business in Connecticut, apprising him of the instant application" (R. 22-23). On September 5, 1957, which was after service was to have been effected, pursuant to the Court's direction (R. 10), the subjoined letter was directed to the defendant in Connecticut by Mr. Ballon, which reads in full as follows:

"Frederick E. M. Ballon
1450 Broadway
New York 18, N. Y.

September 5th, 1957

Mr. Jerome Haskell
Charcoal Hill
Westport, Conn.

Re: Haskell v. Haskell

Dear Mr. Haskell:

Please be advised that we have been served with an order to show cause, returnable September 10th, 1957, requesting the Court to authorize the entry of a money judgment in the sum of $10,320.00, increasing the allowance for the support and maintenance of an infant to $88.00 per week and directing reimbursement for medical and dental expenses incurred.

We are opposing the instant application only to the extent of advising the Court that we no longer represent you; therefore jurisdiction can not be obtained by the service of papers on this office. We suggest that either you or your attorney contact this office by telephone.

Cordially yours,

For Frederick E. M. Ballon

ALS:ef
c.c: Mr. Jerome Haskell
c/o Esquire Motors, Inc.

and to: Erdheim & Armstrong, Esqs." (R. 25)

After the adverse decision dated September 23, 1957, and before the entry of an order thereon, Frederick E. M. Ballon asked the Court to reconsider its decision by moving for re-argument on the grounds that the Court below overlooked the due notice requirements and the Statute involved herein.

The affidavit submitted for reconsideration cited the applicable law and also set forth that:

> "A cursory perusal of the memorandum opinion, would suggest that the application was adjudicated upon the merits, after the defendant was afforded and availed himself of an opportunity to defend. The fact is that the defendant ha not had his day in court, in that the only papers filed in opposition concerned counsel's undisputed lack of authority to represent and appear for the defendant herein. . . ." (R. 29)

Mr. Erdheim, the attorney for the respondent, in opposition to the re-argument requested by Mr. Ballon submitted his affidavit in Special Term, which in part stated:

> "Lastly, it should be noted that apparently defendant's 'former attorney', Frederick E. M. Ballon, Esq., who is making the instant application for reargument, is wittingly or unwittingly, cooperating with Frank L. Miller, Esq.; who has, as recently as May 14, 1957, acted as defendant's attorney, as is evidenced by the annexed photostatic copy, . . ." (R. 38)

Subsequently, after consideration of the affidavits submitted to Special Term, on this application for reargument, a decision was made denying reargument, the Court stating in part:

> ". . . This Court is satisfied that the order to show cause signed by the Hon. Henry Epstein, a justice of this court, on August 19, 1957, provided suitable notice as to satisfy the 'due notice' requirement contained in sections 1170 and 1171-b of the Civil Practice Act." (R. 41; Appendix B)

However, the record shows that the order of Mr. Justice Epstein required:

> "LET service of a copy of this order, and the papers upon which it is based, upon the defendant, or his attorney, on or before the 4th day of September, 1957, be deemed good and sufficient service." (R. 10)

But, it is undisputed in the record that the respondent served neither of the parties directed to be served by the order of Mr. Justice Epstein. In fact, Special Term in its memorandum decision dated September 23, 1957 (Appendix B) recognized that Frederick E. M. Ballon was not "his" (petitioner's) attorney, by designating Frederick E. M. Ballon as petitioner's "former attorney" (R. 41). (Appendix B, Decision—September 23, 1957.)

Upon the basis of this record, petitioner being aggrieved with the entry of judgment against him, without any notice from the respondent, appealed to the Appellate Division and, thereafter, by leave of the Court of Appeals appealed to the latter Court whose judgment is now sought to be reviewed by the Supreme Court of the United States on the grave question raised by the record herein.

How Issue Raised in State Court

In the New York Court of Appeals, petitioner argued in Point I that

> "It was beyond the jurisdiction of Special Term to make the order appealed from, without service of the show cause order and the papers upon which it was based, upon the husband." Citing, Section 1171-B, New York Civil Practice Act, *Griffin* v. *Griffin*, 327 U. S. 220, 225.

Reasons for Granting the Writ

1. The Appellate Division, First Department, Supreme Court, State of New York, affirmed the lower court in a memorandum decision with a finding implied therein that,

the judgment entered in the Court below was a default judgment. The petitioner then asked leave of the Court of Appeals to appeal to that Court from the judgment of the intermediate Court on the ground that there is no basis in law for the implied finding of the Appellate Division, that there was a default in appearance on the part of the petitioner, who was not served with any process whatsoever by the respondent, and, who did not appear by reason thereof. The Court of Appeals was urged to grant the appeal on the authority of *Griffin* v. *Griffin*, 327 U. S. 220, and the clear import of Section 1171-B, Civil Practice Act. Leave to appeal was thereafter granted to the petitioner by the Court of Appeals (Appendix D). In the Court of Appeals the petitioner argued in his brief that, "the only question involved on this appeal is whether Special Term had the power to make the order appealed from, without notice to the husband."

In support of his position petitioner submitted that peculiarly significant and cogent to the question before that Court is the language contained in *Griffin* v. *Griffin, supra,* page 228, wherein the United States Supreme Court had this to say in connection with a failure to give notice to a husband in an application such as the one at bar:

> "Concededly the 1938 judgment was entered without actual notice to or appearance by petitioner, and without any form of process calculated to give him notice of the proceedings * * * Because of the omission, and to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony, there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment *in personam* against him."

The Court of Appeals, as reflected by the opinion of that Court, affirmed the judgment of the intermediate Court,

but, rejected the assumption of the latter Court that there was a default on the part of the petitioner. The Court of Appeals, it is respectfully submitted, however, erred on another ground, when it held, that:

> "Special Term was authorized to find that defendant was duly represented by counsel."

This finding has no support in the Record in the light of the uncontradicted proof that Frederick E. M. Ballon's relationship as attorney terminated with the entry of final judgment in 1950, considered together with the knowledge he communicated to the Court that he was neither authorized, nor was he appearing for the petitioner. In addition, the conceded facts show that the Courts below arbitrarily designated Frederick E. M. Ballon as "his attorney" (petitioner's).

The Court of Appeals construed the appearance of Frederick E. M. Ballon, who sought to be relieved of responsibility as an officer of the Court, and make known to Special Term that it lacked jurisdiction in this action for want of notice to the petitioner or his attorney, as a voluntary general appearance on behalf of the petitioner, which, patently, it is not, but is the reverse of it. The appearance of Frederick E. M. Ballon, Esq., as an officer of the Court, cannot, under any aspect of law, be construed as a general appearance for the petitioner.

The Court of Appeals overlooked the fundamental rule that it is the fact of service of notice which gives the court jurisdiction—not the assumption of jurisdiction without notice.

In the opinion, *Griffin* v. *Griffin*, 327 U. S. 220, there is a footnote at page 245 of said opinion which underscores the basic issue here involved reading as follows:

> "Under the decision of the Court § 1171-b of the New York Civil Practice Act may also be unconstitutional,

> as that section, enacted since the entry of the 1938 judgment, provides that the application for an order directing the entry of judgment for arrears in alimony 'shall be upon such notice to the husband as the court may direct.' It may be that under this wording the New York courts need not direct any notice at all."

It appears that this footnote in *Griffin* v. *Griffin*, prophesied the issue which has arisen in the case at bar. It further appears that the opinion of the Court of Appeals not only disregarded the specific requirement of notice upon the petitioner, but, it, in effect, implied that the New York Courts need not direct any notice at all. The Court of Appeals in its opinion states "no service of new process was necessary for the purpose of acquiring jurisdiction over defendant's person." It is manifest, therefore, that a conflict of opinion arises out of the decision of the United States Supreme Court in *Griffin* v. *Griffin*, *supra*, and the opinion of the Court of Appeals in this case.

2. The Court of Appeals in its opinion points to no case which empowers the judicial arm of the government to disregard the unchallenged State statute involved herein which requires notice to the petitioner and, not to any former attorney.

Over one hundred years ago the Court of Appeals of the State of New York in *Seymour* v. *Judd*, 2 N. Y. 465, 466, clearly stated this principle as follows:

> "• • • It has been repeatedly held, that Courts have no dispensing power, even in matter of practice, where the Legislature have spoken • • •"

In no case cited by the Court of Appeals, was there a failure to give some form of notice to the husband alone, or to the husband together with his attorney under Section 1171-B of the Civil Practice Act which shows that there is no precedent for the determination made by the Court of

Appeals in this case. It is evident that no case cited by the Court of Appeals concerned itself with the basal point involved in this case, i.e., the failure of any notice, personal, by mail, by publication, by substitution, or in any other manner, to the husband in a proceeding under Section 1171-b of the Civil Practice Act (Appendix A).

It is well established that cases are not authority for propositions not considered therein.

In *Webster* v. *Fall*, 266 U. S. 507, 511, the Court stated:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

3. The serious consequences of the opinion of the Court of Appeals in this action cannot be overlooked.

It affects every attorney and every husband involved in a matrimonial action. It destroys the very essence of due process by the holding that the attorney for a husband remains amenable to process, irrespective of a final judgment terminating the action wherein the attorney-client relationship existed. It reduces the fundamental nature of notice to an absurdity when it is considered that an attorney is amenable to process, not only 7 years after the complete termination of the attorney-client relationship, but, for any number of years from 7 upwards.

It is respectfully submitted that the opinion of the Court of Appeals extends beyond the interests of the immediate parties and undercuts the essence of due process.

4. It is hornbook that the required notice must be served on the proper person. Whenever a State statute requires service on a particular person, service on another person is not sufficient.

Frederick E. M. Ballon from any aspect of this case was not the person entitled to notice under Section 1147-b, Civil Practice Act. An analysis of this statute reveals that a former attorney was not intended to be reached by the words "other person". The "other person" referred to in the statute was not inserted as an alternative method of service upon a living person (Appendix A).

At the 170th session of the Legislature which added the words—"or a person other than the husband when an action for an annulment is maintained after the death of the husband", in one part of the statute, and the words—"or other person", following the word "husband", in connection with the nature of the notice required in invoking that statute, clearly sets forth that such "other person" referred to a representative of the husband's estate after the *death* of the husband. The clear import of the Legislature being that so long *as the husband was alive*, he, alone, was to be given notice by the court, and *not notice* to any "other person". The scope of the word "other person" is limited and construed by the words of the same kind added to the statute simultaneously, i.e., "person other than", referring to that situation where a husband had died. This, of course, excludes Frederick E. M. Ballon, from any aspect of the facts as they emerge from this record, to be the "other person" upon whom service could be directed, assuming *arguendo*, the Court below had so intended.

5. Notice contemplated by the State statute involved in this case, implies more than the casual information contained in the letter of Frederick E. M. Ballon, the substance of which was the reverse of notice, as the letter communicated to the petitioner that:

> "• • • jurisdiction cannot be obtained by service of papers in this office • • •" (R. 25)

Moreover, the letter from Frederick E. M. Ballon was neither authorized by the Court, nor was it calculated to give to the petitioner the notice he was entitled to receive; and which the respondent was obligated to deliver. It is not to be overlooked that the respondent's own affidavit reveals that she had the address of the petitioner's home and also had the address of the petitioner's business where he could easily have been reached personally or by mail with no inconvenience at the cost of a few cents. If is also significant that prior to serving notice on Frederick E. M. Ballon, the respondent had affirmative knowledge, as emerges from this record, that Frederick E. M. Ballon was not his (petitioner's) attorney.

It is respectfully submitted that for the foregoing reasons, the petition should be granted for a plenary hearing on this grave question concerning due process.

Respectfully submitted,

I. Stanley Stein,
Counsel for Petitioner.

APPENDIX A

§ 1171-b Enforcement by execution of judgment or order in action for divorce, separation or annulment. *Where the husband* in an action for divorce, separation, annulment, or declaration of nullity of a void marriage, *or a person other than the husband when an action for an annulment is maintained after the death of the husband*, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. *The application for such order shall be upon such notice to the husband or other person as the court may direct.* Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not thereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered. (Emphasis supplied for purpose of discussion under point 4 of this brief.)

APPENDIX B

Memorandum Opinions by Justice Capozzoli

Dated September 23, 1957

Haskel v. Haskell—Motion is granted to the extent of directing the entry of judgment in the sum of $10,320 for the unpaid arrears of support of infant issue.

The other branches of this motion are denied without prejudice. The proof of change in financial and other circumstances as submitted on this motion is insufficient to guide the court in any change of its previous order of support. Likewise, the medical and pharmaceutical expenses listed are too indefinite and there is nothing to support the fact of necessity, reasonableness and that they would be within the means of the person obligated to pay them.

Settle order upon notice to the defendant and to the former attorney.

Dated December 10th, 1957

Haskell v. Haskell—Motion for an order granting reargument of plaintiff's motion, heretofore brought on by order to show cause, to direct the entry of judgment against the defendant herein, is denied. This court is satisfied that the order to show cause, signed by the Hon. Henry Epstein, a justice of this court, on August 19, 1957, provided suitable notice as to satisfy the "due notice" requirement contained in sections 1170 and 1171-b of the Civil Practice Act. It is clear that the attorneys who have asked for the re-argument are acting in co-operation with, if not at the request of, an attorney who has been representing the defendant in current matters.

APPENDIX C

Order of Affirmance

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 24th day of June, 1958.

Present: Hon. CHARLES D. BREITEL,
Justice Presiding
" MARTIN M. FRANK,
" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
" FRANCIS BERGAN,
Justices.

No. 602

MARILYN B. HASKELL, an infant, by her guardian *ad litem*, Celia Alberts,

Plaintiff-Respondent

against

JEROME J. HASKELL,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 6th day of January, 1958, directing the entry of a money judgment in the sum of $10,320 representing arrears of the support and maintenance, pursuant to the plaintiff's application under Sec. 1171-B Civil Practice Act, and said appeal having been argued by Mr. I. Stanley Stein, of counsel for the appellant,

and by Mr. Irving I. Erdheim, of counsel for the respondent; and due deliberation having been had thereon, and upon the decision of this Court filed herein,

It is hereby unanimously ordered that the order so appealed from be and the same hereby is affirmed with $20 costs and disbursments to the respondent, with leave to defendant to apply at Special Term, within 30 days after the service of a copy of this order, with notice of entry, upon his attorney, I. Stanley Stein, to move to open the default as to judgment directed and interpose any defense thereto that he may have.

Enter:

VINCENT A. MASSI,
Clerk.

APPENDIX D

Order Granting Leave to Appeal to the Court of Appeals

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixth day of November A. D. 1958.

Present, HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 505

MARILYN B. HASKEL, an infant, by Celia Alberts her guardian *ad litem*,

Respondent,

vs.

JEROME J. HASKEL,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted.

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

APPENDIX E

Opinion of Court of Appeals

FROESSEL, J.

Several years after the entry of a judgment in plaintiff's favor in an annulment action awarding the sum of $30 per week for the support of the son of the parties, she procured an order directing the entry of a judgment for arrears. The order to show cause on the application for such latter judgment provided for service upon the defendant, a resident of Connecticut, or his attorney.

Service was effected on the defendant's attorney of record in the annulment action. Said attorney did not move under the provisions of section 237a of the Civil Practice Act but merely submitted an affidavit "in partial opposition", urging that he no longer represented defendant, that he had no authority to appear on defendant's behalf, and asked to "be permitted to return the aforesaid moving papers and be relieved of all further responsibility in connection therewith". He thereupon communicated with defendant by mail advising him of the order to show cause, its purpose and the return day, and suggested the latter contact the attorney's office "by telephone".

After an adverse decision and before the entry of an order thereon, said attorney moved for reargument. While that application was under consideration, another attorney, who had represented defendant just a few months previously in another matter relating to the custody of the child of the parties, appeared in the Justice's Chambers in relation to the motion for reargument under the guise of being from the first attorney's office.

Under all the facts and circumstances of this case, Special Term was authorized to find that defendant was duly represented by counsel. For present purposes, an application under said section is treated as a motion in an action (see *Karlin* v. *Karlin*, 280 N. Y. 32, 36; *Fox* v.

Fox, 263 N. Y. 68, 70; *Lund* v. *Lund*, 196 Misc. 136, 137-138), so that no service of new process was necessary for the purpose of acquiring jurisdiction over defendant's person (*Durlacher* v. *Durlacher*, 173 Misc. 329, 331-333; see *Karpf* v. *Karpf*, 260 App. Div. 701, 703-704; see also *Ohlquist* v. *Nordstrom*, 143 Misc. 502, 503-504, affd. 238 App. Div. 766, affd. 262 N. Y. 696; *Griffin* v. *Griffin*, 327 U. S. 220).

The judgment should be affirmed, with costs.

* * *

Judgment affirmed, with costs. Opinion by Froessel, J. All concur; Fuld and Van Voorhis, JJ., in concurring would grant leave to defendant, as did the Appellate Division, to apply at Special Term to move to open the default and to interpose any defense thereto that he may have.

APPENDIX F

REMITTITUR

No. 86

COURT OF APPEALS

STATE OF NEW YORK, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of May in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

Witness,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur May 28, 1959.

No. 86

MARILYN B. HASKELL, an infant, by Celia Alberts, her Guardian ad Litem,

Respondent,

vs.

JEROME J. HASKELL,

Appellant.

BE IT REMEMBERED, That on the 6th day of March in the year of our Lord one thousand nine hundred and fifty-nine Jerome J. Haskell, the appellant—in this cause, came here unto the Court of Appeals, by I. Stanley Stein, his attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Marilyn B. Haskell, an infant, by Celia Alberts, her Guardian ad Litem, the respondent—in said cause, afterwards appeared in said Court of Appeals by Erdheim & Armstrong, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. I. Stanley Stein, of counsel for the appellant—and by Mr. Irving I. Erdheim, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

WHEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON.

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,)
ALBANY, May 28, 1959.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

APPENDIX G

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Pearl and Center Streets, in the Borough of Manhattan, City and State of New York, on the 10th day of June, 1959.

Present: Hon. Morris E. Spector, Justice.

Marilyn B. Haskell, an infant by Celia Alberts, her guardian ad litem,

Plaintiff-Respondent,

against

Jerome J. Haskell,

Defendant-Appellant.

The above named, Jerome J. Haskell, defendant-appellant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Judicial Department, in the office of the Clerk of the County of New York on the 14th day of October, 1958, and the Court of Appeals having affirmed said judgment appealed from with costs;

Now, on motion of Erdheim & Armstrong, attorneys for the plaintiff, it is

Ordered that the order and judgment of the Court of Appeals be made the order and judgment of this Court.

Enter,

M. E. S.,
J. S. C.

APPENDIX H

Judgment on Remittitur of Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

Index No. 31579—1948

MARILYN B. HASKELL, an infant, by Celia Alberts, her guardian ad litem,

Plaintiff-Respondent,

against

JEROME J. HASKELL,

Defendant-Appellant.

The above named, Jerome J. Haskell, defendant-appellant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Judicial Department, in the office of the Clerk of the County of New York on the 14th day of October, 1958, affirming the judgment in favor of the plaintiff-respondent and against the defendant-appellant heretofore entered herein in the office of the said Clerk on the 6th day of January, 1958, in favor of the plaintiff-respondent and against the defendant-appellant, and from each and every part of said judgment of affirmance and order of affirmance as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment, so appealed from be affirmed and judgment rendered for

the plaintiff-respondent, with costs, and having further ordered and adjudged that the proceedings herein be remitted to this Supreme Court there to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of ERDHEIM & ARMSTRONG, attorneys for the plaintiff, Marilyn B. Haskell, it is hereby

ADJUDGED that the said judgment entered herein on October 14th, 1958, be and the same hereby is affirmed; and it is hereby

ADJUDGED that the plaintiff, Marilyn B. Haskell, an infant, by Celia Alberts, her guardian ad litem recover of the defendant, Jerome J. Haskell, the sum of $110.13 costs and disbursements herein as taxed; and that she have execution against the said defendant, Jerome J. Haskell, therefor.

Judgment signed this 11th day of June, 1959.

JAMES McGURRIN
Clerk

Residences

Marilyn B. Barash, formerly known as Marilyn B. Haskell, 82-36 217th Street

Hollis, Queens, NY
Jerome J. Haskell,
c/o Car Wholesalers, Inc.
1555 Jerome Avenue,
Bronx, New York.

FILED

June 16, 1959
New York
County Clerk's Office

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 333

MARILYN B. HASKELL, an infant, by CELIA ALBERTS, her guardian ad litem,

Respondent,

against

JEROME J. HASKELL,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARDHEIM & ARMSTRONG,
Attorneys for Respondent,
342 Madison Avenue,
New York, N. Y.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

On May 23rd, 1950, the respondent was granted a decree in the Supreme Court of the State of New York annulling her marriage to the petitioner upon the ground of fraud. Under this decree she was awarded the sum of $30.00 per week for the support of the infant son of the parties.

On August 19th, 1957, respondent obtained an order to show cause from one of the Justices of the New York State Supreme Court, pursuant to Section 1171-B of the Civil Practice Act wherein she sought judgment for $10,320.00, which represented unpaid arrears of child support. This order provided that:

". . . service of a copy of this order, and the papers upon which it is based, upon the defendant, or his

attorney, on or before the 4th day of September, 1957, be deemed good and sufficient service." (R. 10)

On August 28th, 1957 service of the show cause order was effectuated upon Frederick E. M. Ballon, Esq., the attorney who represented the petitioner throughout the annulment action. Although respondent's moving affidavit expressly set forth petitioner's correct Connecticut residential and business address (R. 12) attorney Ballon made no attempt to contact petitioner so as to apprise him of the pending proceedings. On September 5th, 1957, immediately upon receipt of the opposing affidavit, respondent's attorneys telephoned Ballon's office, pointed out that petitioner's Connecticut addresses were specifically recited in respondent's moving affidavit (R. 22) whereupon Ballon agreed to and actually did on September 5th, 1957, notify petitioner at his residence and business addresses in the State of Connecticut of respondent's application (R. 25). Respondent's motion was granted to the extent of directing the entry of judgment in the sum of $10,320.00 (Petition, appendix B) and an order to that effect, on notice to petitioner and to Ballon, was made and entered.

Thereafter, Frederick E. M. Ballon, Esq., moved for reargument of the application (R. 26). This motion was denied in a memorandum opinion dated December 10th, 1957 (Petition, appendix B).

Argument

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied for the following reasons:

1. The constitutionality of New York Civil Practice Act Section 1171-B (Petition, appendix E) is not drawn in issue. The question, rather, is whether petitioner received

due notice of respondent's application to enter a money judgment for arrears of child support. This question, which is one purely of fact, was raised four times in this proceeding:

(a) on the initial application in the Special Term of the New York State Supreme Court;

(b) on the motion for leave to reargue in the same Court;

(c) on the appeal to the Appellate Division; and

(d) on the appeal to the New York Court of Appeals.

In each instance the question of fact was decided against petitioner. Indeed, the opinion of the Court of Appeals expressly states that "(u)nder all the facts and circumstances of this case, Special Term was authorized to find that defendant was duly represented by counsel" (Petition, appendix E). It is fundamental that on certiorari to a State Court the Supreme Court of the United States will not review questions of fact decided by the Courts below. *Walnut* v. *Wade*, 103 U. S. 683; *Behn Meyer & Co.* v. *Campbell*, 205 U. S. 403.

2. The case of *Griffin* v. *Griffin*, 327 U. S. 220, is not as claimed by petitioner, in conflict with the decision of the New York Court of Appeals in the case at bar. From the opinion in the *Griffin* case it becomes apparent that it was there conceded that a support judgment was recovered by a wife against her former husband and "entered *without actual notice or appearance* by petitioner, and *without any form of service of process calculated to give him notice of the proceeding.*" (Emphasis added.) *Griffin* v. *Griffin*, *supra*, at 228. Clearly this is not the situation in the instant case. As pointed out above, the State Courts have specifically found that petitioner had due notice of respondent's application to Special Term. Moreover, the

Griffin case did not arise under New York Civil Practice Act Section 1171-B and hence the Supreme Court's references to that section are mere *dicta*. In this connection, it is important to note that petitioner's reference to the footnote from the *Griffin* case (Petition 9-10) upon which he places much reliance, is misleading. That footnote appears in the *dissenting* opinion of this Court and not, as petitioner implies, the majority opinion.

It is submitted, therefore, that the citation of a *footnote* from the *dissenting* opinion in a United States Supreme Court case involving Section 1171-B merely by *dictum*, is not sufficient to raise the jurisdiction of this Court!

3. In the instant petition it is for the first time expressly urged that the decision at Special Term denied petitioner due process of law under the 14th Amendment to the Constitution of the United States. No memorandum of law was submitted in opposition to respondent's application to Special Term, or in support of petitioner's motion for leave to reargue. The affidavits submitted by Frederick E. M. Ballon, however, contain the arguments of law and supporting citations, and make it abundantly clear that no federal constitutional issue was there raised (R. 19, 28).

Nor did petitioner effectively raise the constitutional issue he now urges upon this Court before either of the two State Appellate tribunals. The mere citation of the *Griffin* case, *supra*, to the State Appellate Courts was insufficient to raise a timely constitutional issue. Of course, a real and not a fictitious federal question is an essential prerequisite to the jurisdiction of this Court to review judgments of State Courts, *Iowa v. Rood*, 187 U. S. 87; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308 and a mere averment of a federal issue is not sufficient. *Sawyer* v. *Piper*, 198 U. S. 154. The Supreme Court can exercise appellate jurisdiction over State Courts only in a few special cases, 28 U.S.C.A. 1257, and it must appear from the record that

the right claimed was directly presented to and decided by the State Court. *Poydras De La Lande* v. *Louisiana*, 18 How. 192. This rational rule was clearly staed by this Court in *Bridge Proprietors* v. *Hoboken Land & Improvement Co.*, 1 Wall. 116, 143:

> "... . the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

What petitioner did was to raise the notice issue in the State Courts as a matter of *State* law, i.e., whether or not notice was in fact given pursuant to the relevant Civil Practice Statute and in accordance with the mandate of the order to show cause. What petitioner failed to do was to raise the notice issue in the State Courts as a matter of *Federal* law, i.e., whether or not the notice given was sufficient to satisfy the due process requirements of the 14th Amendment to the Federal Constitution.

In this respect, the case at bar is not unlike *American Surety Co.* v. *Baldwin*, 287 U. S. 156. In that case defendant moved in the State Court to vacate a judgment, urging among other grounds that the judgment was entered without notices. There, as here, defendant failed to raise the lack of notice *as a constitutional* objection until late in the Appellate proceeding although he did raise lack of notice throughout the litigation as a matter of State law. In holding that defendant failed to make a proper and timely presentation of the Federal issue and that consequently the Supreme Court should have denied the writ of certiorari, Justice Brandeis, speaking for the Court stated at 287 U. S. 156, 163-164:

> "The Federal claim there made cannot serve as the basis for review by this Court. The contention that a Federal right had been violated rests on the action

of the trial court in entertaining judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of State law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 193, 50 L. ed. 143, 149, 26 S. Ct. 41; Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 L. ed. 213, 214, 40 S. Ct. 116; Live Oak Water Users' Asso. v. Railroad Comm., 269 U. S. 354, 357, 70 L. ed. 305, 308, 46 S. Ct. 149. This is not a case where, as in Saunders v. Shaw, 244 U. S., 317, 320, 61 L. ed. 1163, 1165, 37 S. Ct. 683, the federal claim arose from the unanticipated disposition at the case at the close of the proceedings in the State Supreme Court."

To borrow an appropriate statement of Justice Brown in *Chicago, Indianapolis, etc., Rwy. Co. v. McGuire*, 196 U. S. 128, 133:

"This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted."

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

ERDHEIM & ARMSTRONG,
Attorneys for Respondent.

IRVING I. ERDHEIM and
FRED LICHTBLAU
on the brief.

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SEP 24 1959
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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Not only did the petitioner, at the first opportunity invoke the protection of the Federal Constitution, but the new construction placed by the New York Court of Appeals on the statute involved threatened rights thereunder, as well.

Upon the facts disclosed by this record, it is clear that petitioner, despite the denial to him of his day in Court and the opportunity to interpose his defenses on the merits, sufficiently raised in the highest Court of the State of New York, the Federal question of due process. This is manifest from the sole question presented for determination to the Court of Appeals of the State of New York and set forth fully at pages 7 and 8 of petitioner's brief.

Respondent relies heavily upon *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, cited at page 6 of her brief.

A reading however, of that case will disclose that it is inapplicable to the facts at bar. Conversely, the distinctions and exceptions which are present in the instant case, are clearly recognized therein, cf. *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Brinkerhoff* v. *Hill*, 218 U. S. 673, 678. The unanticipated act of the New York State Court of Appeals in giving to the pertinent Statute a new construction (see pp. 10 and 11 of petitioner's brief), of due process, threatens rights under the Federal Constitution. "It would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." *Saunders* v. *Shaw*, 244 U. S. 317, 320.

Respectfully submitted,

I. STANLEY STEIN,
Counsel for Petitioner.